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Office of Administrative Law Judges
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Issue date: 19Jun2001

CASE NO.: 2000-LHC-3310

OWCP NO.: 07-138483

IN THE MATTER OF

ESSIE LIDDELL,
Claimant

v.

KODY MARINE, INC.,
Employer/Carrier

and

LOUISIANA WORKERS'
COMPENSATION CORPORATION
Carrier

APPEARANCES:

Arthur J. Brewster, Esq.
On behalf of the Claimant

Ted Williams, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et. seq., brought by Essie Liddell (Claimant), against Kody Marine, Inc. and Louisiana Workers Compensation Corporation (Employer/Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on March 8, 2001, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced six exhibits, all of which were admitted into evidence, (CX-1 to CX-6), including Dr. Charles J. Bourgeois' (Dr. Bourgeois) medical records and deposition concerning Claimant's physical condition; medical records of the Medical Center of Louisiana; a police report of Claimant's January 13, 2000 motor vehicle accident; personnel records from Employer regarding Claimant; a letter from Employer to Claimant's attorney with the wages of a comparable worker.

Employer introduced four exhibits, all of which were admitted into evidence, (EX-1 to EX-4), including Dr. Bourgeois' medical records and deposition concerning Claimant's physical condition; Jean Lillis' vocational rehabilitation reports; and Carriers' records reflecting benefits paid to Claimant.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1) and I find:

1. Claimant was injured on November 28, 1995, in a sandblasting accident.
2. Claimant's injury was in the course and scope of his employment.
3. An Employer/Employee relationship existed at the time of the accident.
4. Employer was timely advised of Claimant's injuries.
5. Employer timely controverted the claim.
6. An informal conference was held in connection with this matter on June, 6, 2000.
7. Employer/Carrier paid Claimant TTD from December 11, 1995 to February 1, 2000, at

\$195.61 weekly.

8. Claimant reached Maximum Medical Improvement on June 22, 1999.
9. Employer/Carrier paid medical benefits in the amount of \$26,567.03.
10. The jobs identified by vocational expert Lillis and approved by Dr. Bourgeois paid an average between minimum wage, which was \$4.25 hourly in 1995, and \$5.00 hourly, the equivalent of \$4.63 hourly.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant was temporarily and totally disabled from February 15, 2000 to August 2000 due to his November 28, 1995 workplace injury.
2. Suitable Alternative Employment.
3. Average Weekly Wage.
4. Claimant's entitlement to medical benefits, specifically but not limited to an MRI of Claimant's right shoulder.
5. Attorney's fees and interest.
6. Employer/Carrier's credit for compensation and wages paid.

III. STATEMENT OF THE CASE

A. Chronology:

On November 28, 1995, Claimant injured his right shoulder while working for Employer. He was sandblasting when a hose popped loose and sandblasted his body. (TR. p. 43). Claimant sustained injuries to his right shoulder, right side of his neck and ear and the right side of his chest. At the time of the accident

Claimant had been working for Employer as a sandblaster since August 21, 1995, or for about three months.

Prior to working for Employer, Claimant worked at Avondale Shipyard as a sandblaster/painter and Evans Cooperage as a sandblaster/painter. Claimant was off of work from 1980 to 1985 due to silicosis exposure at Avondale and collected compensation for such. Claimant worked a series of construction jobs and jobs on the waterfront as a longshoreman. (TR. pp. 34-40, 68-76). Claimant was also incarcerated for cocaine distribution and served thirty months in prison. After being released from prison, Claimant worked a series of jobs, and was primarily self-employed cutting grass for unreported cash income. Claimant worked as a sandblaster for Delta Coating for approximately six weeks in 1995, prior to going to work for Employer.

Claimant's treating physician is Dr. Warren Bourgeois, an orthopedic surgeon. He has consistently treated Claimant since October 1997, with his last examination of Claimant being on August 4, 2000. (TR. p. 44). Unrelated to and during the pendency of this claim, Claimant was diagnosed and treated for throat cancer. (TR. p. 44). At the time of the hearing on the instant matter, Claimant was cancer free, using a voice box and receiving Social Security Disability benefits in relation to his history of throat cancer.

On June 22, 1999, Dr. Bourgeois deemed Claimant to have reached maximum medical improvement (MMI) and could return to work light duty. Dr. Bourgeois reiterated that Claimant had reached MMI and could work light duty on November 16, 1999 and December 14, 1999. On January 26, 2000, Dr. Bourgeois approve two jobs identified by vocational expert Lillis as suitable alternative employment (SAE) for Claimant.

On January 13, 2000, Claimant was involved in a motor vehicle accident (MVA). On February 15, 2000, Dr. Bourgeois put Claimant on temporary total disability status and recommended an MRI of his right shoulder. On March 28, 2000, Dr. Bourgeois reported that Claimant had increased pain since his January 13, 2000 MVA. By August 2000, Dr. Bourgeois opined that Claimant had returned to his pre-MVA physical status and could return to work light duty. Moreover, contrary to Claimant's testimony that his shoulder often popped out, Dr. Bourgeois' physical examination on August 4, 2000 revealed no demonstrable instability in Claimant's shoulder. Furthermore, Claimant had full active and passive range of motion in the shoulder. (EX-2, p. 23). Dr. Bourgeois testified that Claimant's diagnosis was the same as it has been all along, multi-factorial pain involving the right upper extremity that could not be reproduced objectively. (EX-2, p. 24).

Claimant was paid temporary total disability benefits at the compensation rate of \$195.61 weekly from his November 28, 1995 workplace accident through February 1, 2000. Claimant has not worked for pay since his November 28, 1995 workplace accident.

B. Claimant's Testimony

Claimant testified that he had worked on and off as a sandblaster for the past seventeen years. (TR. p. 34). Prior to his November 28, 1995 accident, Claimant was disabled from 1980 to 1985 due to silicosis exposure from sandblasting. (TR. p. 64). As a result, he was advised never to work as a sandblaster again, which advice Claimant did not heed. (TR. p. 64). From the late 1980's to 1990 Claimant was in jail. When released he began work as a longshoreman working about two weeks per month. Claimant did this work for about one year followed by four weeks of sandblasting work for Jack Allen in late 1994 and then six weeks of sandblasting for Delta Coating in early 1995. When not working in either capacity, Claimant cut grass two to three times a week making an undisclosed amount of income. (Tr. 65-75).

On November 28, 1995, Claimant injured his right shoulder while sandblasting at work. (TR. p. 43). Immediately following this injury Claimant worked about four to five days supervising sandblasting on an interstate bridge. (TR. pp. 67-68). Claimant finished this work on December 10, 1995 and has not worked since. In 1996, subsequent to and unrelated to Claimant's November 28, 1995 workplace accident, Claimant was diagnosed with throat cancer had surgery to remove his larynx. (TR. p. 44). As a result, Claimant is receiving \$641.00 per month in Social Security Disability benefits. (TR. p. 45).

Claimant testified that on January 13, 2000 he was involved in an MVA. (TR. p. 51). At the hearing on the instant matter, Claimant admitted that he aggravated his shoulder condition in the MVA. (TR. p. 55). Claimant also testified that his shoulder was aggravated by his MVA for three to four weeks, when his shoulder returned to the condition it was in prior to his MVA. (TR. p. 79).

Claimant has admittedly made no attempt to return to work because of shoulder pain for which he takes Lortab three times a day, which in turn makes him dizzy requiring him to lay down. (TR. pp. 78-85). Claimant testified that his shoulder pops out of socket and aches all the time. (TR. p. 46). He further testified, that Dr. Bourgeois instructed him not to drive when taking medication. (TR. p. 85). Claimant testified that Dr. Bourgeois would not approve most types of jobs for him and that Dr. Bourgeois never told him anything about a job. (TR. p. 85).

C. Dr. Warren Bourgeois

Dr. Warren Bourgeois testified via deposition taken on March 13, 2001. (EX-2). Dr. Bourgeois testified that Claimant reached MMI on June 22, 1999 because from a subjective standpoint Claimant was not improving, and objectively Claimant had a full range of motion in his right shoulder with no associated increase in pain. (EX-2, p. 31).

Dr. Bourgeois testified that he examined Claimant again on November 16, 1999, at which time Claimant's exam was unchanged from June 22, 1999. (EX-2, p. 36). He testified that Claimant was still

at MMI and could still work light duty. (EX-2, p. 37).

Dr. Bourgeois testified that he next examined Claimant on December 14, 1999, at which time Claimant had essentially the same complaints. (EX-2, p. 37). Claimant still had full range of motion in the right shoulder, he was still at MMI and was still released to light duty work. (EX-2, pp. 37-38). Dr. Bourgeois testified that the first time he examined Claimant after the January 13, 2000 car accident was on January 18, 2000. (EX-2, p. 38). Dr. Bourgeois further testified that his January 18, 2000 office notes concerning the examination of Claimant on that day were not sent to Carrier because that visit was related to Claimant's car accident and not his November 28, 1995 workplace accident. (EX-2, pp. 38, 41).

Dr. Bourgeois testified that on February 15, 2000, he sent an office note to Carrier totally disabling Claimant for persistent right rotator cuff tendinitis and requesting an MRI of his right shoulder. (EX-2, pp. 21, 42). Dr. Bourgeois' February 15, 2000 note to Carrier did not mention Claimant's January 13, 2000 car accident. (EX-1, p. 29). Still, Dr. Bourgeois admitted that the intensity of Claimant's complaints changed after the MVA, which was the only event historically related by Claimant that would account for the increased complaints. (EX-2, p. 49). Conversely, Dr. Bourgeois testified that he made no mention of the car accident in his February 15, 2000 report because he wasn't sure if the car accident had anything to do with Claimant's increased shoulder pain. (EX-2, p. 42).

Nonetheless, Dr. Bourgeois admitted that Claimant had increased complaints of shoulder pain on range of motion after the car accident which were not present before, and admits that on March 28, 2000, he reported that the car accident aggravated Claimant's shoulder. (EX-2, pp. 43, 46- 48, 50, 60). Upon his February 15, 2000 examination of Claimant, Dr. Bourgeois noted that Claimant was subjectively complaining of increased pain in his right shoulder at that time, as compared to prior examinations in November 1999 and December 1999. Objectively, Dr. Bourgeois found no difference upon examination. The only difference was increased complaints of pain during manipulation of the shoulder. Based on Claimant's subjective pain complaints, Dr. Bourgeois placed Claimant back on temporary total disability from February 15, 2000 to August 2000. (EX-2, pp. 43-48).

Dr. Bourgeois testified that Claimant recovered from his MVA by August 2000, at which time Claimant had returned to his pre-MVA status and could return to work light duty. (EX-2, p. 51). Dr. Bourgeois also testified that Claimant no longer required an MRI of his shoulder, and that suggested medical treatment consisted of office visits every three months to refill Claimant's medications. (EX-2, p. 53).

Dr. Bourgeois testified that on January 26, 2000, he approved two light duty jobs for Claimant sent to him by vocational rehabilitation expert Lillis. (EX-2, p. 41). Dr. Bourgeois testified that Claimant takes Lortab for pain, but Claimant was taking a low dose of Lortab and such a dose would not affect Claimant's ability to perform light duty work. (EX-2, p. 32, 34-35). No mention is made in any of Dr. Bourgeois' records that Lortab made Claimant dizzy or that Claimant should not drive or work while taking Lortab. (EX-1).

D. Vocational Rehabilitation Expert Jean Lillis

Lillis, vocational rehabilitation expert, was assigned to provide rehabilitation services to Claimant in July 1999. (TR. pp. 88-89). She testified that she reviewed Dr. Bourgeois' medical records and was aware of Claimant's work restrictions. She also testified that Claimant was of average intelligence and did not express any interest in re-training or education. (TR. p. 91). Lillis testified that she performed a labor market survey (LMS) on September 7, 1999, which identified the following four jobs as being appropriate for Claimant: (1) a coin/bill changer paying \$5.50 an hour; (2) a label inspector paying \$6.00 hourly for Walle Corporation; (3) a parking lot cashier paying \$5.15 hourly; and (4) a parking lot cashier paying \$5.50 hourly. (TR. pp. 92-93). These job opportunities were sent to Claimant on January 21, and 24, 2000. (TR. p. 96). All of the identified employers were hiring at the time the jobs were sent to Claimant. (TR. p. 97). Lillis testified she took Claimant's voice box into account in identifying these jobs. (TR. p. 93).

Lillis testified that Dr. Bourgeois approved the coin/bill changer and label inspector jobs on February 1, 2000. (TR. p. 94). She sent the two parking lot cashier jobs to Dr. Bourgeois under separate cover, but Dr. Bourgeois did not respond one way or the other as to whether these two jobs were within Claimant's physical restrictions. (TR. p. 94). Lillis testified that the two parking lot cashier jobs had the same physical restrictions as the two jobs Dr. Bourgeois approved. (TR. p. 95). Moreover, Lillis testified that Claimant showed no interest in pursuing the four jobs identified, or in any other vocational services. (TR. p. 96).

E. Employer Witness Russel Michiels

Michiels is a claims representative for Carrier, and has handled Claimant's claim since the November 28, 1995 accident. (TR. p. 98). Michiels testified that the first time he ever saw Dr. Bourgeois' January 18, 2000 report referencing Claimant's car accident was at the March 8, 2001 hearing of this matter. (TR. p. 98). Michiels testified that in February, 2000, he received a note from Dr. Bourgeois indicating that Claimant was temporary totally disabled and required a right shoulder MRI. (TR p. 99). No mention of a MVA was made in Dr. Bourgeois' February 2000 report. (TR. p. 99).

Michiels testified that he sent Dr. Bourgeois a letter asking him why Claimant was totally disabled and needed an MRI when his previous reports indicated Claimant was at maximum medical improvement and could work light duty. (TR. p. 99). In response, Dr. Bourgeois sent Michiels a report dated March 28, 2000, indicating that Claimant had been in a MVA which had worsened his symptoms. This March 28, 2000 report was Michiels' first notice of Claimant's MVA.

IV. DISCUSSION

A. Contentions of the Parties

Claimant asserted that: (1) he is entitled to new period of temporary total disability (TTD) from February 15, 2000 to August, 2000, because of his November 28, 1995 workplace injury and that his January 13, 2000 MVA did not permanently aggravate or worsen his pre-existing work related disability; (2) Employer was unjustified in terminating compensation benefits on February 1, 2000, and thereafter, terminating medical care on May 23, 2000; (3) he is entitled to an average weekly wage of \$400.00, based on the wages of a comparable worker, with a weekly compensation rate of \$266.66 for all periods of disability.

On the other hand, Employer asserted that: (1) Claimant was released to light duty on June 22, 1999, at which point he was at MMI and but for the MVA would have remained at MMI with light duty work restrictions; (2) Claimant is entitled to only permanent total disability (PPT) from June 22, 1999 to February 1, 2000, when suitable alternative employment was established by vocational expert Lillis; (3) Claimant's AWW should be based upon the minimum compensation rate of \$195.61 weekly because he has not demonstrated the capacity to remain employed for any length of time past two or three months; and, (4) Claimant is not entitled to an MRI of his shoulder and is entitled to basic maintenance visits to Dr. Bourgeois every two to three months, which is the medical care Claimant was receiving up to his MVA.

B. Burden of Proof and Credibility

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333(1953); J. B. Vozzolo, Inc. v. Britton, 377 F. 2d 144(D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251(1994), affg. 990 F.2d 730(3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101(1997); Avondale Shipyards, Inc., v. Kennel, 914 F.2d 88, 91(5th Cir. 1988); Atlantic Marine, Inc., and Hartford Accident & Indemnity Co., v. Bruce, 551 F. 2d 898, 900(5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929(1968).

C. Claimant's Prima Facie Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act **it shall be presumed**, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a)(emphasis added).

The Benefits Review Board (herein the Board), has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308(9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation. Id.

Once Claimant's *prima facie* case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them. The burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. Gooden v. Director, OWCP, 135 F.3d 1066 (5th Cir. 1998); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co., v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The presumption is not rebutted merely by suggesting an alternative way that Claimant's injury may have occurred. Williams v. Chevron, USA, 12 BRBS 95(1980). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144(1990); Holmes v. Universal Maritime Service Corporation, 29 BRBS 18, 21 n.3 (1995). If the Employer rebuts the presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. Devine v. Atlantic Container Lines, G.I.E., 23 BRBS 279(1990).

In the instant case, the parties have stipulated that an accident occurred in the course and scope of Claimant's employment with Employer, on November 28, 1995, resulting in injury to Claimant's right shoulder, as established by the record, including the medical evidence as presented by Dr. Bourgeois. Thus, Claimant established his *prima facie* case, creating a presumption under Section 20(a) that his injury arose out of employment. However, this presumption does not establish entitlement to either compensation or benefits under the Act until Claimant establishes the nature and extent of his disability.

D. Nature and Extent of Disability and Suitable Alternative Employment

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59(1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110(1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n. 5(1985); Trask v. Lockheed Shipbuilding Construction Co., *supra.*; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157(1989). The date of maximum medical improvement is a question of fact

based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186(1988); Williams v. General Dynamics Corp., 10 BRBS 915(1979). An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857(1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401(1981). In the instant case, Claimant reached MMI as to his right shoulder on June 22, 1999, as stipulated in the record.

To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89(1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339(1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125(5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100(1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Once the case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment (SAE). Turner, 661 F.2d at 1038; P&M Crane, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261(1988). Total disability becomes partial on the earliest date on which the employer establishes SAE. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1(CRT)(D.C. Cir. 1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128(1991). An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. Conover v. Sun Shipbuilding & Dry Dock Co., 11 BRBS 676, 679(1979). If employer does not offer suitable work at its facility, the Fifth Circuit in Turner, established a two-pronged test by which employers can satisfy their alternative employment burden:

- (1) Considering claimant's age, background, etc., what can claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
- (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and he could realistically and likely secure? This second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he

diligently sought the job.

661 F.2d at 1042; P&M Crane, 930 F.2d at 430.

If the employer meets its burden by establishing suitable alternative employment (SAE) the burden shifts to the claimant to prove reasonable diligence in attempting to secure some type of SAE shown within the compass of opportunities, by the employer, to be reasonably attainable and available. Turner, 661 F.2d at 1043. Termed simply, the claimant must prove a diligent search and the willingness to work. Applebaum v. Halter Marine Serv., 19 BRBS 248(1987). Moreover, if the claimant demonstrates that he diligently tried and was unable to obtain a job identified by the employer, he may prevail. Roger's Terminal & Shipping Corp., v. Director, OWCP, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826(1986); Hooe v. Todd Shipyards Corp., 21 BRBS 258(1988). If the claimant fails to satisfy this "complementary burden," there cannot be a finding of total and permanent disability under the Act. Turner, 661 F.2d at 1043; Southern v. Farmers Export Co., 17 BRBS 64(1985).

There was no dispute that Claimant could not return to work as a sandblaster for Employer due to his shoulder injury. The record contains objective medical evidence that Claimant is unable to return to his former employment and indicates that he suffered permanent restrictions of light duty due to his November 28, 1995 workplace injury. Thus, he is entitled to TTD until he reached MMI and thereafter PTD until Employer established SAE.

On February 1, 2000, Employer showed the presence of SAE, when Dr. Bourgeois approved two of the jobs identified by vocational expert Lillis as being within the light duty restrictions he placed upon Claimant. Claimant admitted that he has made no attempt to return to work, stating that he takes Lortab, pain medication, three times a day, which makes him dizzy. Claimant further testified, that Dr. Bourgeois advised him not to drive when taking medication and would not approve most types of jobs for him. Claimant's testimony is not supported by the record, which indicates that Dr. Bourgeois prescribed Claimant a low dose of Lortab, which would not affect his ability to work and, in fact, Dr. Bourgeois specifically approved two of the jobs identified by Lillis as SAE for Claimant. Furthermore, Dr. Bourgeois' records on Claimant do not indicate that Claimant reported Lortab to make him dizzy.

As stipulated by the parties, the jobs identified by Lillis and approved by Dr. Bourgeois paid an average between minimum wage, which was \$4.25 hourly in 1995, and \$5.00 hourly, the equivalent of \$4.63 hourly. Thus, based on \$4.63 hourly and a forty hour work week, Employer established SAE paying \$185.20 weekly, and a loss of wage earning capacity of \$143.20 based on an average weekly wage of \$400.00 pursuant to 10(b) of the Act.

On February 15, 2000, following Claimant's January 13, 2000 MVA, Dr. Bourgeois placed Claimant back on TTD due to Claimant's subjective complaints of increased pain in his right shoulder. Objectively, Dr. Bourgeois could not reproduce Claimant's pain involving the right upper extremity.

Dr. Bourgeois testified that Claimant recovered from his MVA by August 2000, at which time Claimant had returned to his pre-MVA status and could return to work light duty.

Claimant's assertion that he is entitled to a second period of TTD from February 15, 2000 to August 2000 is not supported by objective, credible evidence of record and is rejected. I do not credit Claimant's subjective pain complaints which led Dr. Bourgeois to assert a second period of TTD. Rather, I find as asserted by Employer, that Claimant is entitled to only one period of TTD from December 11, 1995 to June 22, 1999 after which he was entitled to a period of PTD until SAE was established on February 1, 2000 after which Claimant is entitled to a period of PPD.

Accordingly, based on the foregoing I find Claimant is entitled to temporary total disability (TTD) compensation benefits from December 11, 1995 to June 22, 1999, Claimant's date of MMI regarding his shoulder injury based on an AWW of \$400.00; permanent total disability (PTD) from June 23, 1999 to February 1, 2000, the date SAE was established based on an AWW of \$400.00; and, permanent partial disability (PPD) from February 2, 2000, and continuing, based on an AWW of \$400.00 and a loss of wage earning capacity of \$143.20.

E. Entitlement to Medical Care and Benefits

Pursuant to Section 7(a) of the Act, 33 U.S.C. § 907(a), Employer is responsible for reasonable and necessary medical expenses that are related to Claimant's compensable injury. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539(1979); Pardee v. Army & Air Force Exchange Serv., 13 BRBS 1130(1981). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258(1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee, 13 BRBS at 1130; Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374(1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, but not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63(5th Cir. 1981), *aff'd* 12 BRBS 65(1980). Furthermore, an employee's right to select his own physician, pursuant to section 7(b), is well settled. Bulone v. Universal Terminal and Stevedore Corp., 8 BRBS 515 (1978).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (*per curiam*), *rev'd* 13 BRBS 1007(1981), *cert. denied*, 459 U.S. 1146(1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10(1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299(1983).

Consent to change physicians *shall* be given when the employee's initial free choice was not of a specialist whose services are necessary for, and appropriate to, proper care and treatment. Consent may be given in other cases upon a showing of good cause for change. Slattery Associates, Inc., v. Lloyd, 725 F.2d 780, 786, 16 BRBS 44(CRT)(D.C. Cir. 1984); Swain v. Bath Iron Works Corp., 14 BRBS 657 (1982). The regulation only states that an employer *may* authorize a change for good cause; it is not *required* to authorize a change for this reason. Swain, 14 BRBS at 665.

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant is released from the obligation of continuing to seek employer's approval. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294(1988). The claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury, in order to be entitled to such treatment at the employer's expense. Rieche v. Tracor Marine, 16 BRBS 272 (1984); Wheeler v. Interocean Stevedoring, 21 BRBS 33(1988). The employee need not request treatment when such a request would be futile. Shell v. Teledyne Movable Offshore, 14 BRBS 585, 590 n.2(1981).

Section 7(d)(2) of the Act provides in pertinent part that:

(2) No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. § 907(d)(2).

As discussed above, Claimant's November 28, 1995 right shoulder injury was sustained in the course and scope of his employment. Claimant argued that he is entitled to all reasonable and necessary medical care for treatment of his right shoulder injury by, or at the direction of Dr. Bourgeois, under Section 7 of the Act. Employer argued that Claimant is not entitled to an MRI of his right shoulder, and is only entitled to basic maintenance visits to Dr. Bourgeois every two to three months. In fact, Dr. Bourgeois testified that Claimant no longer required an MRI of his shoulder, and that suggested medical treatment consisted of office visits every three months to refill Claimant's medications. (EX-2, p. 53). Thus, I find that under Section 7 of the Act, Claimant is entitled to the aforementioned reasonable and necessary medical care of basic maintenance visits for medication monitoring every three months, as recommended by treating physician Dr. Bourgeois for treatment of Claimant's right shoulder injury. (EX-2, p. 30).

E. Average Weekly Wage

As Claimant is entitled to compensation, Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by fifty-two to arrive at the average weekly wage, 33 U.S.C. § 910(d)-(1). Empire United Stevedores v. Gatlin, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

Claimant asserted that his AWW should be computed under Section 10(b) of the Act, amounting to an AWW of \$400.00 and a compensation rate of \$266.66. Employer asserted that Claimant is only entitled to the minimum compensation rate at the time of his accident, which was \$195.61 weekly, because he has not demonstrated the capacity to remain employed for any length of time past two or three months. I find that I am required by the Act, to first exhaust Section 10(a) before looking to Section 10(b), and subsequently exhaust Section 10(b) before looking to Section 10(c).

As such, Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment ... whether for the same or another employer, during substantially the whole year preceding his injury." 33 U.S.C. § 910(a). Empire United Stevedores, 936 F.2d at 821; Duncan v. Washington Metro. Area Transit Authority, 24 BRBS 133, 135-36 (1990). Claimant worked as a sandblaster for a little over three months for Employer in 1995 and for approximately six weeks for Delta Coating in 1995 prior to working for Employer. In late 1994, Claimant worked as a sandblaster for Jack Allen for about four weeks. When Claimant was not working for the aforementioned Employers, he was cutting grass for an unspecified amount of unreported cash income. Thus, a Section 10(a) computation is inappropriate because Claimant did not work in the same type of employment, whether for the same or another employer, during substantially the whole year preceding his injury. Section 10(a) of the Act is thus inapplicable, and I must next examine the possible applicability of Section 10(b) of the Act prior to the application of 10(c). Palacios v. Campbell Indus., 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978).

Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). I find that Section 10(b) of the Act is the most appropriate means of calculating Claimant's AWW, as clearly established by the record (CX-1), a June 19, 2000 letter Employer representative, Judy L. Griffin, Human Resources Manager to Claimant's counsel, in which she admitted that a worker comparable to Claimant would make \$20,800.00 annually amounting to an AWW of \$400.00 and a weekly compensation rate of \$266.66. No evidence was presented to the record contradicting the validity of the aforementioned wages of a comparable worker. In short, Claimant's AWW while working for Employer is found to have been \$400.00, with a corresponding compensation rate of \$266.66.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724(1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986(4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961(1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20(1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability (TTD) for the period from December 11, 1995 to June 22, 1999, Claimant's date of MMI, based on an average weekly wage of \$400.00 with a corresponding compensation rate of \$266.66, pursuant to Section

908(b) of the Act.

2. Employer/Carrier shall pay Claimant compensation for permanent total disability (PTD) for the period from June 23, 1999 to February 1, 2000, the date SAE was established, based on an average weekly wage of \$400.00 with a corresponding compensation rate of \$266.66, pursuant to Section 908(a) of the Act.
3. Employer shall pay Claimant compensation for permanent partial disability (PPD) for the period from February 2, 2000 and continuing based upon a loss of wage earning capacity of \$143.20 pursuant to Section 8 (c)(21). The compensation rate shall be \$143.20 based on a average weekly wage of \$400.00 and a post injury wage earning capacity of \$185.20 per week
4. Employer/Carrier shall receive a credit for all wages and compensation paid Claimant as and when paid.
5. Employer/Carrier is responsible for reasonable and necessary past, present, and future medical treatment for Claimant's November 28, 1995 , right shoulder injury under Section 7 of the Act as provided by Dr. Bourgeois. Employer was not justified in terminating medical care on May 23, 2000, with Claimant entitled to at least periodic maintenance visits once every three months by Dr. Bourgeois.
6. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent, as determined by the Secretary of the Treasury, of the average auction price for the last auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director.
7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 19th day of June, 2001, at Metairie, Louisiana.

A
CLEMENT J. KENNINGTON
Administrative Law Judge